(38)

No. 493

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

IDAHO POTATO GROWERS. INC.; W. P. WILSON; L. S. TAUBE, TED TAUBE and L. B. HOLDEN, Co-partners, doing business as L. S. TAUBE & COMPANY; MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, Co-partners, doing business as S. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAH O'NEIL, Administratrix of the Estate of J. E. O'Neil, deceased; A. G. STUART; C. R. HOLDEN and L. L. HOLDEN, Co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

and

BRIEF IN SUPPORT OF PETITION

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IN THE

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

The petitioners, IDAHO POTATO GROWERS, INC.; W. P. WILSON; L. S. TAUBE, TED TAUBE and L. B. HOLDEN, co-partners, doing business as

L. S. TAUBE & COMPANY; MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, co-partners, doing business as S. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAH O'NEIL, Administratrix of the Estate of J. E. O'Neil, deceased; A. G. STUART; C. R. HOLDEN and L. L. HOLDEN, co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION, respectfully pray that a writ of certiorari be issued to review the decision (R. 749) and decree (R. 798) of the United States Circuit Court of Appeals for the Ninth Circuit entered June 30, 1944, affirming the decision and order of the National Labor Relations Board of April 10, 1943 (R. 69-76) in which the National Labor Relations Board affirmed the finding of the Trial Examiner for the Board that the employees of the Petitioners were not agricultural laborers (R. 88-92).

Opinions Below

On January 9, 1943 the Trial Examiner for the defendant Board filed his intermediate report (R. 77-149) with the Board. Upon the petition for review filed by the Petitioners (R. 150), and the answer of the Board (R. 163-171) the Board entered its decision and order on the 10th day of April, 1943 (R. 69-76).

A petition for review was addressed by the Petitioners to the Ninth Circuit Court of Appeals (R. 150-162), and on June 30, 1944 the Ninth Circuit Court of Appeals affirmed the order and decision of

the Board (R. 749), (..... Fed. (2d) .....) and entered a decree in the nature of a mandatory injunction (R. 798).

Jurisdiction

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., 347) and under section 10(e) of the National Labor Relations Act of 1935 (29 U.S.C.A. 160(e)).

Statutes Involved

The statute involved is the National Labor Relations Act of 1935 (49 Stat. 450; 29 U.S.C.A., Secs. 151-166), and particularly section 2(3) of said Act which subsection, in defining 'employee' and the non-coverage of certain employees, states:

> "but shall not include any individual employed as an agricultural laborer."

(For sections, see appendix.)

Statement of Facts

The employers involved in this case are in three classifications: (1) those who are dealers only; (2) those who are farmers and dealers, and (3) Idaho Potato Growers, Inc., which is a co-operative association and does not buy potatoes but markets the same for its members (R. 85).

The potatoes are graded, weighed and sacked in

two classes of places: (1) About ninety percent of the potatoes processed by some of the petitioners are originally handled and processed in the cellars of the farmers on the farms where they are grown (R. 90); (2) the balance are processed in the warehouses of the dealers (R. 89).

The cellar crews are those that work in the farmers' cellars on the farms where the potatoes are grown, and the warehouse crews are those that work in the warehouses of the dealers. The cellar crews are composed in part of regular farm employees of the farmer, the farmer himself in many instances being a member of the cellar crew (R. 90). Most of the farmers own their own sorting machines (R. 226). The grading and sorting does not change the form of the potatoes.

The equipment used to sort potatoes is a simple, power-driven elevator called a sorter (R. 88). The employees on a crew usually consist of four sorters (who pick out culls, etc.), one scooper (who places the potatoes on the elevator), a jigger (who sacks and weighs), a sack sewer, and a swamper (who removes culls, etc.) (R. 88-89). Regular experienced farm hands on the farms where the potatoes are grown perform any or all of the above named duties (R. 665). When the farmer does not have enough of his regular farm help to make up a crew he fills it up with others (R. 665).

Under the decision and decree of the lower court five of the petitioners who own and operate their own farms, plant, cultivate and harvest the potatoes grown thereon, and prepare the same to meet the required grade in their own cellars, on their own farms and use their own equipment, are compelled to negotiate with the Union for all of their employees working in their cellars regardless of whether they work elsewhere or ot. Almost all of the potatoes, whether grown on the petitioners' farms or not, receive the first processing in the cellars on the farms. Approximately ninety percent of the potatoes handled by some of the petitioners are graded and packed in the growers' cellars (R. 89).

All of the petitioners (except Traffic Association) are connected with the production, harvesting or marketing of potatoes at Idaho Falls, Idaho, and adjacent points. Of the nine petitioners, five are engaged in farming and in the production of potatoes on their own farms (R. 82-88), and Petitioner, W. P. Wilson, during 1941-1942 produced on his farm about 65 carloads of potatoes which he processed on his farm and also maintained a warehouse from which he shipped about 385 carloads of graded potatoes of others (R. 83-84). All of the potatoes grown on his own land were harvested and sorted by a cellar crew of his own employees on his own land (R. 186; 275).

Petitioner Stuart, during 1941-1942, produced on his own farm ten carloads of graded potatoes and also

shipped about 190 carloads of graded potatoes of others (R. 86).

Petitioner O'Neil produced in 1942-1943 about 15% of the total amount of graded potatoes shipped on her own farm and she shipped about 800 carloads during said period (R. 277).

Petitioner Idaho Falls Bonded Warehouse Company, a family corporation, (R. 262) produced on the farms of the family from 15% to 35% of the entire amount of potatoes handled by it, and during 1941-1942 it shipped a total of 700 carloads of graded potatoes (R. 263-264; 266-267); a large part of the potatoes grown on the farms of the family are packed by their employees who work on their farms the year round (R. 266).

Petitioner Holden Brothers produced on its own farms about 65% to 70% of the entire amount of potatoes handled by it, and during 1941-1942 shipped a total of 739 carloads of potatoes (R. 185-186). In addition, petitioner Holden Brothers' principal occupation is that of general farming and stock raising (R. 185).

Most of the employees of petitioner Holden Brothers work on its farms the year round doing general farm work and sometimes in the wintertime work in the warehouse of the petitioner when they cannot work on the farm (R. 186; 513).

Petitioner Idaho Potato Growers, Inc., a non-profit

association, incorporated under the cooperative marketing statutes of the State of Idaho (R. 85), does not buy the potatoes which it handles but ships them for the accounts of the farmers and makes a final settlement at the end of the season (R. 83). The farmers own the potatoes until finally disposed of in markets over the country.

Of all the other employees involved, a large percentage are regular farm laborers, some of them on the farms of petitioners, others on farms of the members of the association, and others in the immediate vicinity where the crops are harvested (R. 231).

Ownership of the potatoes continues in the growers until U. S. No. 1 grade is attained by means of the labor of the employees here involved. In the case of such of the petitioner-dealers, who do not produce any of their own potatoes, and of those producer-dealer petitioners, who, in addition to handling their own, purchase potatoes from other growers, ownership of the potatoes does not pass from such other persons until U. S. No. 1 grade has been determined, and title to the potatoes only that attain such grade passes, and in the case of potatoes handled by the Potato Growers, Inc., title does not pass until finally purchased by some consignee (R. 258-259). In all instances, the balance of the potatoes, such as culls and those not reaching the required grade, remain the property of the grower.

The prices which the grower receives for his crop when not sorted and sacked by his regular farm labor is subject to reduction by the sorting and packing costs incurred by the dealer, who normally pays the wages of the potato workers and deducts the amount of the payment from the price which would otherwise be payable to the growers (R. 273; 190-191-194; 233; 664-665; 692-693). Occasionally, a grower pays the wages of the member of a regular crew of potato workers with his own check (R. 693). In other words, the farmer always bears the expense and cost of the labor and employees herein involved, whether the work is done on the farm or in the warehouse.

When a petitioner-dealer purchases a farmer's potatoes, he agrees to take such of them as make U.S. Grade No. 1; he sometimes sends a crew out to the farmers' cellar to sort and sack the U. S. Grade No. 1 potatoes.

At times the dealer does not send out a complete crew because the farmer himself works as a member of the crew and at times the farmer has one or more of his own farm hands work as members of the crew (R. 90.) The farmer bears the cost of the sorting and sacking.

The farmer has such control over all crews working on his farm, handling his potatoes, that he can stop the crew from working until his grievances are adjusted (R. 91).

The Board filed one complaint against all of the petitioners, including Idaho Potato Growers, Inc., a non-profit cooperative association, Idaho Traffic Association, which neither produced, sold or handled potatoes, the petitioners who produced the potatoes, and strictly dealers in potatoes (R. 43-57). The petitioners, jointly and severally, have continuously objected to this consolidation (R. 60; 82).

The lower court and the Board charged and held that the protest meetings held by the farmers who are not parties were unfair labor practices on the part of Petitioners, which protest meetings were merely an assertion by the farmers of their rights to non-coverage granted them by the Act (R. 94; 121).

The Board found that both the farm cellar crews and warehouse crews of each and every petitioner (except Traffic Association), exclusive of foremen and supervisory employees, together and without distinction, constitute units appropriate for collective bargaining (R. 71). The Board ordered the Petitioners to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of the employees of the Petitioners in each of the units found by the Board to be appropriate (R. 72), and to cease and desist from in any manner interfering with, restraining, or coercing the employees of the Petitioners in the exercise of their rights as guaranteed by Section 7 of the Act (R. 72). The lower court did likewise by its decree (R. 798).

The Board ordered all of the Petitioners (exclusive of Petitioner, Traffic Association) to bargain collectively with the Unions "as the exclusive representative of all of the employees of respondent dealers in each of the units found above to be appropriate with respect to rates of pay wages, hours of employment, and other conditions of employment" (R. 73). The court entered its decree ordering Petitioners to do what the Board had ordered as to "the employees of Petitioner-dealers in each of the units found above to be appropriate for the purposes of collective bargaining" (R. 799). No distinction was made by the Board or the court between cellar crews and warehouse crews; and the court in its decree does not define what is meant by the words "in each of the units found above to be appropriate."

The Circuit Court affirmed the above order (R. 749) and granted the petition of the Board for its enforcement (R. 798).

The petitioners who are engaged in farming are now confronted with an order of the Circuit Court compelling them to bargain collectively with all of their employees who happen to work in the farm cellars on the petitioners' farms, using petitioners' equipment, and sorting petitioners' potatoes, even though said employees may have worked for the respective farmers throughout the entire year, and may have assisted in planting, cultivating and harvesting the

identical crops which they also assist in cleaning and grading.

Reasons Relied On For Allowance of Writ

The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this court.

(a) It has decided that laborers (known as cellar-men) engaged in cleaning, culling, grading and sacking potatoes without changing their character from raw farm produce (commonly called "processing" or "grading") on the farm where produced, for and at the expense of the farmer-producer are not "agricultural laborers" excepted from the National Labor Relations Act, and that they and their employers are subject to such Act and the jurisdiction of the National Labor Relations Board.

(b) It has decided that such laborers (cellar-men), so engaged on such farm for and at the expense of such farmer, as in (a) above, where such farmer also further "processes" or "grades" potatoes grown and owned by other farmers, at their expense, at warehouses, are not "agricultural laborers" excepted from the National Labor Relations Act, and that both the laborers at the farm (cellar-men) and at the warehouse (warehouse men) are a single bargaining unit, and are, and said farmer is, subject to such Act and the National Labor Relations Board.

(c) It has decided that laborers (warehouse men) engaged in "processing" or "grading" potatoes identically with such work on a farm for a farmer, when done in a warehouse owned and operated by a co-operative organization of farmer-producers, and upon potatoes owned by producer-members, and at the farmer-producer-member's expense, are not "agricultural laborers" excepted from the National Labor Relations Act, and that both the co-operative and such laborers are subject to such Act and the National Labor Relations Board.

(d) It has decided that laborers (whether cellarmen or warehouse-men) so engaged in "processing" or "grading" potatoes at the expense of a farmer-producer, when done on a farm, or in a warehouse owned and operated by a person who buys, or as the agent of such farmer-producer procures a buyer for, that portion of the potatoes found, by such "processing" or "grading", to be U. S. No. 1 grade, are not "agricultural laborers" excepted from the National Labor Relations Act, and that all such laborers and said warehouse owners are subject to such Act and the National Labor Relations Board.

(e) It has decided that all such foregoing laborers are in a single category, without distinction, for bargaining purposes.

(f) It has decided that all such foregoing farmer-producers, farmer co-operatives, farmer-producer-

warehouse owners, warehouse-owners and warehouse-owner-buyers or agents, together with traffic associations, without any such employees, may be jointly guilty with respect to all such laborers jointly, whether on farm or in warehouse, of unfair labor practices, and that they may be joined in one proceeding.

(g) It has by its decision denied to farmers the protection of the National Labor Relations Act, by subjecting them and their employees to such Act and Board, notwithstanding the exception of "agricultural laborers" from said Act; and has denied farmers and farmer organizations the right of free speech guaranteed by the first amendment to the Constitution of the United States of America—and has so interpreted the words of exception, "agricultural laborer", in the National Labor Relations Act, as to constitute said Act as a law of Congress abridging the freedom of speech.

(h) It has decided that meetings of farmer-producers protesting unionization of such laborers constitute unfair labor practices; and has ordered collective bargaining with respect to all such laborers, and all such employers, without distinction.

(i) It has defined and applied the general term, and exception, of "agricultural laborer" as contained in the National Labor Relations Act, differently from and in conflict with the definition of identical or substantially identical terms, and exceptions, in the Fair Labor Standards Act (Title 29, Sec. 213, U. S. C. A.),

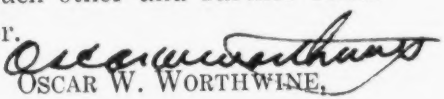
and Social Security Act (Act of August 14, 1935, Chap. 531, Title IX, Sec. 907-49, Stat. 642), resulting in confusion as to the meaning and coverages of the three acts when applied to the same operations, employers and employees.

(j) It has defined and applied the general term, and exception, of "agricultural laborers" as contained in the National Labor Relations Act, differently from and in conflict with the local law, custom and understanding within the State of Idaho in and with reference to the identical, or substantially identical operations, employers and employees (Batt v. Unemployment Compensation Division, 63 Idaho 522, 123 Pac. (2d) 1004; Big Wood Canal Co. v. Unemployment Compensation Division, 61 Idaho 247, 100 Pac. (2d) 49; 63 Idaho 785, 126 Pac. (2d) 15; Carstens v. Ind. Acc. Bd., 63 Idaho 613, 123 Pac. (2d) 1001, ... Idaho ....., 144 Pac. (2d) 203; Smythe v. Pheonix, 63 Idaho 585, 123 Pac. Pac. (2d) 1010; Cook v. Massey, 38 Idaho 264, 220 Pac. 1088.)

(k) It has entered a decree for a mandatory injunction which is vague, indefinite and uncertain.

WHEREFORE, Your petitioners pray that a Writ of Certiorari be issued in the above named cause under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit, City of San Francisco, California, commanding said court to certify and send to this Court for its review and determination on a day certain therein named, a full

and complete record of all proceedings in the case numbered and entitled on its No. 10490, Idaho Potato Growers, Inc., et al, Petitioners versus National Labor Relations Board, Respondent; and that the said judgment of said Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and that your petitioners be granted such other and further relief as may be just and proper.



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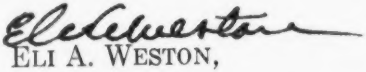

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